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Supreme Court, U.S.
FILED

08-202 AUG 12 2008

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

Mark E. Batton,

Petitioner,

versus

The United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal court indefinitely incarcerate a taxpayer who claims a Fifth Amendment privilege in an IRS summons enforcement proceeding, on the basis that no Fifth Amendment rights attach to documents, without having provided the taxpayer an opportunity, including an in camera examination, to demonstrate entitlement to the privilege?

2. Because a "blanket assertion" of the right against self-incrimination is disfavored in tax enforcement proceedings, may the IRS avoid honoring a taxpayer's rights against self-incrimination by serving a summons asking hundreds of questions and seeking documents not known to be possessed by the taxpayer and then pursue a contempt finding against the taxpayer for asserting a "blanket" Fifth Amendment privilege because the taxpayer was forced to assert the privilege numerous times?

3. May a federal court hold a taxpayer in contempt for failing to provide to the IRS documents that (a) are already in the government's possession, (b) are not in the possession or control of the cited person, (c) never existed, and/or (d) are covered by a valid invocation of the cited person's rights against self-incrimination?

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PETITION FOR A WRIT OF CERTIORARI

Mark E. Batton respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its summary decisions of February 26, 2008, and May 14, 2008, affirming the judgment of the United States District Court for the Southern District of Texas, in order to resolve the conflict between the Fifth, Tenth, and Eleventh Circuit Courts of Appeal.

—— ✦ ——

OPINIONS BELOW

Neither decision of the Fifth Circuit is published. Both are summary opinions and are contained in the appendix at pages 1 and 8. The first decision is the panel's affirmance of the district court's order. The later decision is the Fifth Circuit's denial of rehearing.

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JURISDICTION

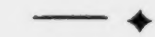
The United States commenced the lower court proceeding when it filed an Internal Revenue Service summons enforcement action, pursuant to 26 U.S.C. §§ 7402 & 7604 and 28 U.S.C. §§ 1340 & 1345, against Mark E. Batton in the Southern District of Texas, Houston Division, on January 24, 2007. App. 10.

The district court entered orders adverse to Mr. Batton and its final order of May 7, 2007, was timely appealed to the United States Court of Appeals for the Fifth Circuit. Exercising jurisdiction pursuant

to 28 U.S.C. § 1291, the court of appeals denied Mr. Batton's appeal on February 26, 2008, and denied rehearing on May 14, 2008. App. 7, 1, 8.

This petition for a writ of certiorari is filed within ninety days of May 14, 2008, and therefore timely pursuant to Rule 13 of the Rules of the Supreme Court.

This Court may exercise jurisdiction in this case pursuant to 28 U.S.C. § 1254(1).



STATUTES INVOLVED IN THIS CASE

United States Code, Title 26, Section 7402(b):

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

United States Code, Title 26, Section 7604:

> (a) Jurisdiction of district court
>
> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or

other data.

(b) Enforcement

Whenever any person summoned under section 6420 (e)(2), 6421 (g)(2), 6427 (j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States magistrate judge for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or magistrate judge to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States magistrate judge shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

STATEMENT OF THE CASE

Mark E. Batton is a Houston, Texas, salesman being audited by the Internal Revenue Service. As part of that audit, Mr. Batton was summoned by the IRS to produce documents and provide oral testimony. Mr. Batton delivered documents he had possession and control of to the IRS, denied having other documents,

asserted a Fifth Amendment privilege claim as to others, and also asserted the privilege as to most of the oral examination over the course of more than eighteen months of investigation and three hours of examination.

After Mr. Batton filed a Freedom of Information Act request to learn what documents the IRS already possessed, the IRS sought enforcement of its summons by petition to the federal district court in Houston. The district court summarily granted the IRS's petition, and during further enforcement proceedings directed Mr. Batton to produce documents over which he had no possession or control or to which he claimed privilege, ruling that Mr. Batton had no Fifth Amendment rights to documents. See app. 2 & 3.

The district court conducted no inquiry and made no findings as to whether any privileged documents were covered by Mr. Batton's Fifth Amendment protection, and made cursory findings that Mr. Batton had possible control of sought documents. The district court ordered Mr. Batton incarcerated until he has fully complied with the summons – meaning that he must relinquish his rights against self-incrimination in order to purge the contempt -- and trapping him in a Catch-22 of remaining silent and remaining incarcerated, or answering questions and likely be charged with a false statement count for incorrectly answering questions.

Mr. Batton appealed to the Fifth Circuit Court of Appeals which without comment affirmed the district court and then denied rehearing. Mr. Batton remains incarcerated pursuant to the district court's contempt finding and as of this writing has not been granted a hearing to allow him to explain his

entitlement to the Fifth Amendment protection against self-incrimination.

REASONS TO GRANT THE WRIT

A writ of certiorari should be granted to review on the merits the decision of the Fifth Circuit Court of Appeals affirming the district court's erroneous rulings. The lower courts misinterpreted this Court's holdings affirming the right of an individual to assert a Fifth Amendment privilege against the production of documents. Granting the writ could (1) resolve a split among the circuit courts concerning the scope of an individual's Fifth Amendment rights under an IRS summons, (2) allow this Court, under its general supervisory authority, to correct a grievous error of law resulting in an individual's indeterminate incarceration, and/or (3) allow this Court to vacate the lower court judgments and remand the case for consideration of the issues under prevailing case law.

1. Due Process Violation

The Due Process Clause of the United States Constitution provides a person notice and an opportunity to be heard in a meaningful manner prior to any deprivation:

> "The essence of procedural due process is fair play; hence, the fundamental due process requirement 'is the opportunity

> to be heard at a meaningful time and in a meaningful manner.'"

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985), quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

This Court in Daniels v. Williams, 474 U.S. 327, 331 (1986) held that "the touchstone of due process is protection of the individual against arbitrary action of government." Thus, when a government officer arbitrarily acts to deprive a person of property or liberty interest, constitutional due process rights will be implicated.

Mr. Batton was entitled to have meaningful notice and a meaningful opportunity to be heard in response to the IRS Petition. Mr. Batton was served with the time of the contempt show cause hearing only one day in advance. One day is plainly insufficient time to provide Mr. Batton with procedural or substantive due process.

In United States v. Sorrells, 877 F.2d 346, 348 (5th Cir. 1989), the court of appeals wrote:

> Once a district court orders the enforcement of a summons requesting the production of documents, there arises a presumption that documents of the type described in the summons are in existence and in the continuing possession or control of the defendant.

This presumption must imply that the district court has expressly determined that particular documents relevant to the summons exist and are possessed by taxpayer. Here, the district court never determined whether there existed any documents not already in IRS possession. Mr. Batton had worked for over a year gathering documents and responding to inquiries by the IRS agent of items within his possession or control.

Enforcement of due process is critical at the Petition stage because:

> Once an enforcement order is issued, a defendant cannot contend in a contempt proceeding that he lacked possession or control of the requested documents; he may only argue that he presently is unable to comply with the order . . . .

Sorrells, 877 F.2d at 349-350.

Hence, a district court must provide reasonable notice and a reasonable opportunity to a taxpayer to allow a response prior to limiting any defenses that may exist. Therefore, it was incumbent upon the district court to make the required findings of document existence and a finding that Mr. Batton has possession of the particular documents.

In United States v. Gippetti, 96 AFTR 2d 2005-6978, the Third Circuit Court of Appeals wrote that "[w]e, too believe that an express determination of possession or control is required." The Third Circuit

quoted United States v. Barth, 745 F.2d 184, 187 (2d Cir. 1984):

> Before ordering production on penalty of contempt, the district court should expressly determine that the Respondent possesses the summoned documents.

Other authority indicates that any contempt proceeding is inappropriate when the documents are not in the possession of the taxpayer. See United States v. Howard, 360 F.2d 373 (3d Cir. 1966); United States v. Hansen Niederhauseer Co., Inc., 522 F.2d 1037 (10th Cir. 1975) (hearing required to show the existence of records when taxpayer plead inability to produce them); United States v. Troescher, Loren, 74 AFTR 2d, 94-6250 (D.C. CA, 1994) (5th Amendment is an adequate defense in contempt proceeding where production of documents was concerned).

The seminal authority in IRS summons enforcement cases is United States v. Powell, 379 U.S. 48, 58 (1964), where this Court held:

> It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused . . .

The Fifth Circuit wrote in United States v. Wyatt, 637 F.2d 293, 301 (5th Cir. 1981) about the "abuse of process":

> Such an abuse would occur if the

> (summons') purpose was . . . solely for criminal prosecution . . or where enforcement would contravene . . . the privilege against self-incrimination, or for any other purpose other than one of 'good faith' on the part of the IRS concerning that particular investigation of civil liability.

The IRS summons sought, in Section B, only those "books, records and other documents in ***your*** possession and control. . . ." App. 13 (emphasis added). Mr. Batton did not have any such items in his possession and control. The summons in Sections B through F sought categories of documents which are vague in description and impossible to determine whether any such documents exists. App. 13-16. Neither the IRS nor the district court determined what documents in this vast laundry list needed to be produced. The determination of whether Mr. Batton could comply was left solely to IRS discretion.

The IRS must have a "realistic expectation rather than an idle hope that something might be discovered." United States v. Harrington, 388 F.2d 520, 524 (2d Cir. 1968). Guesswork or intuition is not enough. A summons with a demand for documents, "if any," and ending with "etc." is vague and compliance is impossible. This is a dangerous situation.

> Issuance of an enforcement order constitutes an adjudication that the respondent possesses and is able to produce the summoned documents at the

> time the order is issued. Thereafter, the respondent must produce the documents or face contempt proceedings in which he is foreclosed from claiming nonpossession at the time of the enforcement order . . . . Because of its potentially drastic consequences, however, an enforcement order in a contested proceeding should not rest on a determination of possession that is merely implicit. Before ordering production on penalty of contempt, the district court should expressly determine that the respondent possesses the summoned documents.

United States v. Barth, 745 F.2d 184, 187 (2d Cir. 1984) (citations omitted).

Therefore Mr. Batton has been denied due process in the proceeding and is being held in contempt of court, held in jail, for failing to produce documents that have never been identified or found to exist. This is an Alice In Wonderland nightmare that holds Mr. Batton in jail, unable to purge the contempt.

2. Fifth Amendment Protection

Some of the authorities cited above show that Mr. Batton possess a Fifth Amendment right to remain silent and not produce or identify incriminating documents. The district court was under the erroneous belief that Mr. Batton possessed no Fifth Amendment rights whatsoever. The Fifth Circuit erred in affirming this finding. See app. 3.

The district court's error may be in part because it believes that Mr. Batton has no Fifth Amendment right because the case is not *solely* a criminal action. Initially, the district court apparently forgot that the IRS summons, in paragraph A, sought "oral testimony" from Mr. Batton concerning documents and other items. App. 13. Mr. Batton enjoys an absolute right to not incriminate himself with oral testimony.[1] Without mentioning the oral testimony component, the district court focused immediately on documents and announced during the 2007 show cause hearing:

> THE COURT: You don't have a Fifth Amendment privilege to documents. So, what are y'all talking about. Good grief. What are we doing here? He doesn't have a Fifth Amendment privilege on the documents.

Tr. 90, Transcript of Show Cause Hearing (May 7, 2007). The district court was wrong in this conclusion, and to make matters worse, in its announcement of its ruling the court weighed heavily – and negatively – on Mr. Batton's assertion of the Fifth Amendment privilege. No fewer than five times did the court

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[1]Near the end of the 2007 show cause hearing, the court asked the IRS agent to go down the summons and identify which items he had not been provided by. Despite Mr. Batton's invocation of his Fifth Amendment rights, the agent told the district court that "I have not received Item A, which is the oral testimony related to the financial transactions and taxable transactions for Mr. Batton." Tr. 95, Transcript of Show Cause Hearing (May 7, 2007).

negatively note that Mr. Batton had declined to talk to agents or provide documents and instead cited his Fifth Amendment privilege. Id. 107-08. Without any discussion of whether Mr. Batton was justified to any extent in exercising his Fifth Amendment rights, the district court found him in contempt. The only way for Mr. Batton to cure the contempt is for him to forfeit his Fifth Amendment protections and talk to the IRS agents, risking indictment for a multitude of offenses (perjury, false statements, obstruction of justice, etc.) if the IRS did not agree with things Mr. Batton said.

In a written order entered June 25, 2008, following the appeal but before this Petition is filed, the district court compounds its Fifth Amendment error by writing that because the IRS summons at issue here is not solely to gather evidence in a criminal prosecution, the Fifth Amendment protection against self-incrimination does not apply. App. 3. The district court cites two *unpublished* cases from the Fifth Circuit as its principal support of the erroneous notion that Mr. Batton has no Fifth Amendment rights whatsoever in this case. The first unpublished case, United States v. Henderson, 209 Fed. Appx. 401, 402 (5th Cir. 2006), held that the taxpayer had no Fifth Amendment right against the IRS summons, but there are no facts reported to determine whether the case would be applicable to the instant case. But Henderson, as the district court writes, cites United States v. Roundtree, 420 F.2d 845, 852 (5th Cir. 1969), for the Fifth Amendment holding. Roundtree does ***not*** support the district court's ruling.

The district court held that the Fifth Amendment defense is inapplicable unless the ***sole*** purpose of the IRS summons is for criminal

prosecution. Roundtree held that if a person is able to show that the IRS's purpose is solely criminal, then the IRS summons must fail. 420 F.2d at 852. The Fifth Circuit also held that the "mere fact that evidence might be used against Roundtree in a later prosecution will not support a claim of self-incrimination." Id. Mr. Batton has no quarrel with this holding. But Roundtree's very next sentence is most important, and one the district court failed to take into account:

> If, however, Roundtree can show that the investigation has become 'an inquiry with dominant criminal overtones,' he is entitled to raise his [F]ifth [A]mendment objections.

420 F.2d at 852, quoting Stuart v. United States, 416 F.2d 459 (5th Cir. 1969). Mr. Batton has argued ad nauseam that the dominant purpose of the IRS investigation is criminal, and even has an affidavit from an IRS official in charge of FOIA requests to support that argument. IRS attorney Sarah Sheldon testified that ***a criminal referral is "imminent."***). The district court's logic and interpretation of Roundtree and Henderson is flawed and directly results in Mr. Batton's incarceration.

The district court's only other support for its erroneous view of Mr. Batton's Fifth Amendment protection is the unpublished case of United States v. Pate, 105 Fed. Appx. 597, 599 (5th Cir. 2004). See Order of June 25, 2008. App. 4. Pate ***did not hold***, as the district court appears to believe, that there is no Fifth Amendment protection in an IRS summons case

that is civil and criminal in nature. Instead, the Fifth Circuit held, albeit in this unpublished decision, that the Fifth Amendment may indeed be properly invoked by the taxpayer on a question-by-question basis. Pate, 105 Fed. Appx. at 599. That is exactly what Mr. Batton did in the instant case, but the district court erroneously believes that Mr. Batton's burden is to show that the IRS's summons is "solely criminal" before he may raise any Fifth Amendment claim. App. 5.

The district court notes that Pate cites United States v. Southeast First National Bank, 655 F.2d 661, 664 (5th Cir. 1981), for the holding that the Fifth Amendment is not implicated unless the IRS summons is "solely criminal." App. 13. Southeast First Nat'l Bank is not a Fifth Amendment case; the case does not discuss or raise a Fifth Amendment issue; indeed, counsel can find no mention of the Fifth Amendment in the case. Thus, it does not support the district court's erroneous holding.

In United States v. Doe, 465 U.S. 605 (1984), this Court held that the actual production of documents was indeed covered by the Fifth Amendment's protection against self-incrimination. Grand jury investigations into possible municipal contract corruption resulted in numerous subpoenas being served on Doe, seeking business records of five sole proprietorships under which Doe apparently did business. ***The lower courts held that Doe's privilege against self-incrimination shielded him from punishment for failure to produce the subpoenaed documents.***

> "With few exceptions, enforcement of the subpoenas would compel [Doe] to admit

> that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [Doe's] Fifth Amendment rights . . . . The government argues that the existence, possession and authenticity of the documents can be proved without [Doe's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect the witness in subsequent proceedings,"

465 U.S. at 613, quoting, In re Grand Jury Empanelled March 19, 1980, 541 F. Supp.1, 3 (D.N.J. 1981).

In its decision agreeing with the district court, the Third Circuit added:

> "we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist – or that the appellee even is somehow connected to the business entities under investigation – is attempting to compensate for its lack of knowledge by

> requiring the appellee to become, in effect, the primary informant against himself."

465 U.S. at 613, quoting, In re Grand Jury Empanelled March 19, 1980, 680 F.2d 327, 335 (3d Cir. 1982).

The act of producing voluntarily-prepared papers may itself be protected by the Fifth Amendment because the "act of production" may convey information as to the existence, authenticity, and possession of evidence, as well as the belief that any evidence actually produced matches a subpoena's terms. Fisher v. United States, 425 U.S. 391, 410 (1976); see also United States v. Hubbell, 530 U.S. 27, 36 (2000).

The district court was clearly wrong in its order denying Mr. Batton any recognition that he holds a Fifth Amendment privilege to certain questions, conducts, and/or documents. The Fifth Circuit was clearly wrong when it affirmed the district court.

Mr. Batton is held to be in contempt of court for asserting his Fifth Amendment privilege too much. The IRS calculated a specific inquiry, made after eighteen months of inquiry and examination of records, with an eye toward criminal prosecution. Being unable to obtain an indictment or prosecution with the evidence it holds – more than 5,300 pages of documents identified in the Freedom of Information Act case – the IRS turned to Mr. Batton to incriminate himself. Mr. Batton has deposited $40,000 with the IRS for payment of taxes for the period under audit,

which is in addition to the W-2 withholding kept from his employment paychecks. He has asked the IRS to calculate his tax. However, the IRS developed a summons whose purpose was to trap Mr. Batton in a false statement charge (asked to testify about documents not in his possession but thought to be in the possession of the IRS) and directed him to turn over an endless chain of documents that he does not possess, an inability which places him in jail. Protecting Mr. Batton's Fifth Amendment rights will

This Court, under its general supervisory authority of the lower federal courts, act to remedy an injustice and grant the writ, vacate the lower court orders, and remand this case for proper consideration of Mr. Batton's due process and Fifth Amendment rights.

CONCLUSION

Mark Batton respectfully prays that this Court grant the petition for a writ of certiorari, vacate the lower courts orders, and remand for consideration of Mr. Batton's due process and Fifth Amendment rights. Alternatively, it as prayed that the Court grant petition for certiorari and consider this case on the merits.

Respectfully submitted,

Steven M. Presson
Counsel for Mark E. Batton

Appendix 1

APPENDIX

Exhibit 1: Fifth Circuit Order on Appeal
Filed 2-26-08

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20382
Summary Calendar

UNITED STATES OF AMERICA
Petitioner-Appellee

v.

MARK E. BATTON
Respondent-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 04:07-MC-27

Before HIGGINBOTHAM, STEWART, and OWEN, Circuit Judges.
PER CURIAM:*

Having reviewed the district court's order, the parties' briefs, and the record, we find no reversible error. Accordingly, we AFFIRM.

* Pursuant to 5TH Cir. R. 47.5, the court has

determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH Cir. R. 47.5.4.

Exhibit 2: Current Order of Detention Filed 7-31-08

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA
v. Misc. Action No. H-07-27
MARK BATTON

ORDER

IT IS HEREBY ORDERED that Mark Batton is remanded into federal custody for contempt of Court.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 31st day of July, 2008, at Houston, Texas.

/s/ Vanessa D. Gilmore
Vanessa D. Gilmore
United States District Judge

Appendix 3

Exhibit 3: Order Entered by District Court Subsequent to the Appeal
Filed: 6-25-08

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Petitioner,

versus Case No. 04:07-mc-0027

MARK E. BATTON,
Respondent.

ORDER

This case is pending before the Court for enforcement of an administrative summons issued by the Internal Revenue Service (IRS) on March 31,2006. (Instrument No.1, at I). The Court previously found, at the conclusion of a show cause hearing on May 7, 2007, that Respondent was not in compliance with the summons, and held Respondent in contempt. (Instrument No. 26; Instrument No. 36, at 109).

Following the issuance of a decision by the Fifth Circuit affirming this Court's ruling, the Court held a hearing on June 11, 2008, to determine if the respondent had complied with the IRS's administrative summons. (Instrument Nos. 45, 53). Both Petitioner and Respondent advised the Court that there had been no compliance with the previously-issued summons. Respondent requested an opportunity to purge his contempt, and the Court ordered that he could seek to purge his contempt by producing the documents in his possession or control

and filing a written, verified response to each item requested in the IRS summons: (1) documenting all efforts to obtain the requested documents; and (2) identifying any reasons why he has been unable to obtain such documents.

The Court had previously found Respondent in contempt and ordered him to be detained in the U.S. Marshals cell block until he came into full compliance with the IRS summons. (Instrument No. 26; Instrument No. 36, at 109). Due to overcrowded conditions in the U.S. Marshals' cell block, the Court reevaluated the detention arrangements at the June 11 hearing, and ordered that Respondent's place of detention be changed from the U.S. Marshals' cellblock to the Montgomery County jail.

On June 13,2008, Respondent filed a Motion to Purge Contempt, in which he purported to comply with the Court's order to file a verified response to each item in the IRS summons. (Instrument No. 55). However, Respondent produced no documents in conjunction with this Motion, gave no indication regarding efforts made to obtain documents, and failed to list any reasons why he had been unable to obtain documents. Instead, the Respondent asserted a Fifth Amendment privilege - repeatedly - based on his belief that a criminal investigation is imminent. (Instrument No. 55, at 2, 4,5). Although the declaration ofIRS attorney Sarah Sheldon, filed in a companion case, does indicate that, with respect to Respondent, a "referral to CI [i.e., Criminal Investigation] is imminent," the IRS has not made a criminal referral at this time. (Instrument No. 56).

An administrative summons from the IRS does not implicate the Fifth Amendment unless "its sole

purpose is to build a criminal case." United States v. Henderson, 209 Fed. Appx. 401, 402 (5th Cir. 2006) (citing United States v. Roundtree, 420 F.2d 845,852 (5th Cir. 1969)); see also United States v. Pate, 105 Fed. Appx. 597, 599 (5th Cir. 2004) (citing United States v. Southeast First Nat'l Bank of Miami Springs, 655 F.2d 661, 664 (5th Cir. 1981)). Because, for instance, a tax fraud inquiry may involve intertwined civil and criminal elements, the IRS may issue a summons even if the investigation results in a recommendation for criminal prosecution of the taxpayer. See United States v. LaSalle Nat'l Bank, 437 U.S. 298, 309 (1978). It is the taxpayer's burden to demonstrate that the IRS's purpose in issuing a summons is solely criminal. Pate, 105 Fed. Appx at 599 (citing Roundtree, 420 F.2d at 852). When a taxpayer fails to carry that burden, "the summons is enforceable and the taxpayer must present him or herself before the court with the requested documents." Id. 2

Respondent has not demonstrated that the IRS's purpose in issuing its summons is solely criminal, nor has Respondent presented himself before the court with the documents requested by the IRS. Accordingly, the Court finds that Respondent has not purged himself of his contempt at this time and the Motion to Purge Contempt is DENIED.

Respondent has also filed a Renewed Application to Stay Execution of Order Pending Appeal. (Instrument Nos. 59). In this filing, Respondent raises the same issues as in his first Motion to Stay, which this Court denied on June 4, 2008. (Instrument No. 50). Respondent has not presented any evidence nor articulated any arguments

to convince the Court that its previous denial was in error. Accordingly, Respondent's Renewed Application to Stay Execution of Order Pending Appeal is DENIED.

Nothing in this Order precludes Respondent from seeking to purge his contempt by filing an amended reply to the IRS summons that comports with the requirements of the Court's earlier order. At the risk of belaboring the point, Respondent's amended reply should contain a written, verified response to each item requested in the IRS summons, as follows: (1) a list of all documents in Respondent's possession or control, along with an attestation that all such documents have been produced to the IRS; (2) a description of all efforts made to obtain the requested documents; and (3) a recitation of any reasons why Respondent has been unable to obtain such documents.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 25th day of June, 2008, at Houston, Texas.

/s/ Vanessa Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

Appendix 7

Exhibit 4: District Court Order Filed 5-7-07

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

v. Misc. Action No. H-07-27

MARK BATTON

ORDER

IT IS HEREBY ORDERED that Mark Batton is to be detained in the U. S. Marshal's cell block from 9:00 a.m to 4:30 p.m Monday through Friday until he is in full compliance with the IRS summons. Failure to report daily at the designated time will result in Mark Batton being arrested and housed at the Federal Detention Center.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this 7th day of May, 2007, at Houston, Texas.

/s/ Vanessa D. Gilmore
Vanessa D. Gilmore
United States District Judge

Appendix 8

Exhibit 5: Order Denying Rehearing Filed 5-14-08

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20382

UNITED STATES OF AMERICA
Petitioner – Appellee

v.

MARK E. BATTON
Respondent – Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITIONS FOR REHEARING AND
REHEARING EN BANC

(Opinion February 12, 2008, 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM, STEWART, and OWEN, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5th CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the

members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearings En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Patrick Higginbotham
United States Circuit Judge

Appendix 10

Exhibit 6: Petition to Enforce Summons
Filed: 1-24-07

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	CIVIL NO.
	)	
v.	)	07-mc-0027
	)	
MARK E. BATTON,	)	
	)	
Respondent.	)	

PETITION TO ENFORCE
INTERNAL REVENUE SUMMONS

The United States of America, through undersigned counsel, at the request of the Chief Counsel, Internal Revenue Service, a delegate of the Secretary of the Treasury, and at the direction of the Attorney General of the United States, hereby petitions this Court for an order enforcing the Internal Revenue Service ("IRS") administrative summons served on respondent Mark E. Batton, and complains and alleges as follows

1. This Court has jurisdiction over the matter and is empowered to issue appropriate process upon application by the United States pursuant to I.R.C. (26 U.S.C.) §§ 7402 and 7604 and 28 U.S.C. §§ 1340 and 1345.

2. Venue over this matter is proper in the

Southern District of Texas as the respondent resides in or may be found within the boundaries of the district.

3. Revenue Agent Chris Driskill, of the Internal Revenue Service, is conducting an examination to determine the correct federal income tax liabilities of Mark E. Batton for tax years ending December 31, 2001, December 31, 2002, and December 31, 2003. (Declaration of Revenue Agent Chris Driskill (hereinafter Exhibit 1, Driskill Decl. at ¶ 3).

4. Accordingly, on March 31, 2006, under the authority of 26 U.S.C. § 7602, a summons was issued to Respondent Mark E. Batton (hereinafter "Batton"). (Exhibit 1, Driskill Decl. at ¶ 4 and Exhibit 3, Declaration of Revenue Officer Roger Caris at ¶ 4).

5. Revenue Officer Roger Caris personally served the summons upon Batton, as indicated in the Certificate of Service, as required by 26 U.S. C. § 7603. See Exhibit 3. A copy of summons with Certificate of Service is attached as Government Exhibit 2 to the declarations and is incorporated by reference.

6. The summons directed Batton to appear on May 2 and 3, 2006, to give testimony and produce for examination certain books, records, papers, and other data as described in the summons. (Exhibit 1, Driskill Decl. at ¶ 4 and Exhibit 2).

7. Batton failed to appear at the time and place designated by the summons and failed to produce said records and documents, specifically documents related to his off shore credit card activities. (Exhibit 1, Driskill Decl. at ¶ 8).

8. The testimony, and information contained in the documents, except as listed in paragraph 9 of Driskill's Declaration, are not in the possession of the Internal Revenue Service. See Exhibit 1 at ¶ 9.

9. In order to obtain enforcement of a summons, the petitioner must establish that the summons: (1) is issued for a legitimate purpose; (2) seeks information relevant to that purpose; (3) seeks information that is not already within the IRS' possession; and (4) satisfies all administrative steps required by the Internal Revenue Code. United States v. Powell, 379 U.S. 48, 57-58, (1964). The petitioner's burden of satisfying the Powell requirements is a "slight one" that can be met merely by presenting the sworn affidavit of the agent who issued the summons attesting to these facts. United States v. Dynavac, Inc., 6 F.3d 1407, 1414 (9th Cir. 1993); United States v. Gilleran, 992 F.2d 232, 233 (9th Cir. 1993).

10. In further support of this Petition and incorporated herein by reference, the United States submits the Declarations of Revenue Agent Chris Driskill and Revenue Officer Roger Caris. The United States has met the Powell factors through these documents.

WHEREFORE, Petitioner United States respectfully requests that this Court enter an Order requiring the Mark E. Batton to appear at a date and hour to be determined by the Court to give testimony and produce the aforementioned items set out in summons attached as exhibits to the declarations, or at a date and hour to be designated by the Court to show cause, if Respondent can, why Respondent should not be directed by the Court to appear and produce the items set out in Exhibit 1 and to testify. The United States requests that the Court authorize any United States Marshall or Revenue Officer or Revenue Agent of the IRS to serve a copy of this petition and the Order to Show Cause on the Respondent.

Appendix 13

DONALD J. DeGABRIELLE, JR.
United States Attorney
/S/Herbert W. Linder
HERBERT W. LINDER
LEAD ATTORNEY
Attorney, Tax Division
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Department of Justice
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Dallas, Texas 75201
(214) 880-9754; 214-880-9741 (FAX)
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ATTORNEYS FOR THE UNITED STATES

[attachments omitted]

Exhibit 7: Items Sought by Summons
(Exhibit to Petition filed 1-24-07)

A. Oral testimony relating to your items of income, expense, taxable transactions, potential deductions, financial transactions, books, records, and other documents for the tax years ended December 31, 2001, December 31,2002 and December 31, 2003.

B. All books, records and other documents in your possession and control reflecting any financial dealings between you and Coastal Consulting or any entity of similar name during the tax years ended December 31, 2001, December 31, 2002 and December 31, 2003, including but limited to:

Appendix 14

1. Employment contracts;

2. Employment agreements;

3. Documents showing your hours worked, duties, contacts at Coastal Consulting, the person you reported to or dealt with at Coastal Consulting, sales territory, clients served, compensation, benefits, sales made, etc.

4. Credit cards provided by Coastal Consulting to you or for your use;

5. Credit card statements related to these cards;

6. Credit card receipts or charge slips related to these cards;

7. Payments on these credit cards;

8. Payments received from Coastal in any form not previously provided (the government possesses copies of payment deposited into Compass Bank, account #0076513449, in 2002 and 2003);

9. Documents showing your ownership, if any, in Coastal Consulting;

10. Documents showing your investment, if any, in Coastal Consulting;

11. Any documents you have regarding the location, address, operations, history, ownership, owners, employees, finances, clients, or any other dealings of Coastal Consulting;

C. All documents in your possession or control reflecting the transfer, movement or allocation by you or by persons under your direction of funds or assets outside the United States of America during the years ended December 31, 2001, December 31, 2002 and December 31, 2003.

D. All documents you have showing how much cash on hand you had for the following periods:

1. 1/1/2001 and 12/31/2001.

2. 1/1/2002 and 12/31/2002.

3. 1/1/2003 and 12/31/2003.

E. All documents you have showing your employers or from whom you received any type of compensation for services for the years ended December 31, 2001, December 31, 2002 and December 31, 2003, including reimbursements for employee business expenses or similar reimbursements. You may exclude documents previously provided for Tubbesing Sales Corporation for 2002 and 2003.

F. All books and records and other data in your possession or control, reflecting the receipt of income or expenditure of deductible expenses for the tax year ended December 31, 2001, including but not limited to:

1. All documents showing your ownership, if any, in any entity in 2001.

2. Copies of any filed federal tax returns for all entities in which you had ownership in 2001.

3. All documents relating to any income you received in 2001, excluding the Tubbesing Sales Corporation Form W-2.

4. All documents reflecting your purchase, acquisition, lease or interest in any assets or property during 2001 valued at $500.00 or more.

5. All documents reflecting the purchase, lease, ownership or other interest in homes, timeshares, cars, boats, motorcycles, recreational vehicles or other valuable assets in 2001, including but not limited to deeds, mortgages, leases, contracts, receipts, invoices, cancelled checks, cashiers checks and any other form of payment.

6. All documents relating to any gifts, inheritances, family loans, transfers or other

nontaxable amounts you received or controlled in 2001.

7. All documents relating to any loans you made to other paries in 2001.

8. For the period 12/01/2000 through 01/31/2002 provide all records in your possession or control reflecting your interest in, control of or authority over any domestic or foreign checking, savings, money market, certificates of deposit, brokerage, mutual fund, private banking and/or any other accounts, including but not limited to copies of all signature cards, bank statements, bank reconciliations, deposit slips, cancelled checks, wire transfers, wire instructions, credit memos, debit memos, loan applications, financial statements prepared for you, notes or mortgages you executed, and records reflecting any loans you received or loan payments you made.